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Supreme Court, U.S.
FILED

05-345 SEP 12 2005

No. _____

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**In the
Supreme Court of the United States**

ADAM FRIEDRICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the decisions of the Court of Appeals and the federal district court violate the requirements of the Supreme Court decision in *Fedorenko* by failing to take into consideration the entire circumstances of the Respondent's service in the German Waffen SS during World War II.

PARTIES TO THE PROCEEDINGS

The Petitioner is an individual, Adam Friedrich. The Respondent is the United States of America.

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OPINIONS BELOW

The opinion of the Eighth Circuit (App. B, p. 3a) is reported as *United States v. Friedrich*, 402 F.3d 842, rehearing denied (8th Cir. 2005), and the decision of the United States District Court for the Eastern District of Missouri, 305 F. Supp. 2d 1101(2004) is included in the Appendix (App. C, p. 10a). The opinion and order of June 13, 2005, of the Eighth Circuit, denying Petitioner's Motion for Rehearing, is also included in the Appendix (App. A, p. 1a).

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on March 31, 2005. The Court of Appeals entered its order denying a timely petition for rehearing and petition for rehearing en banc on June 13, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the definition of persecution as found in the Refugee Relief Act, Pub. Law No. 203, 67 Stat. 400, as amended, 68 Stat. 1044 (1954). It also involves the definition of persecution of others as found in 8 U.S.C. 1101(a)(42) (concerning eligibility for political asylum) and 8 U.S.C. 1231(b)(3)(B) (concerning eligibility for withholding of deportation).

STATEMENT OF THE CASE

Adam Friedrich was issued a visa on February 10, 1955, which allowed him to be inspected and admitted to the United States and naturalized pursuant to 8 U.S.C. Sec. 1427(a) (Sec. 316(a) of the 1952 Act) by order of the district court in St. Louis on May 4, 1962.

The Government, represented by the Office of Special Investigations (OSI), Department of Justice, filed a Complaint demanding revocation of the order admitting Adam Friedrich to citizenship and canceling the certificate of citizenship on the ground that his naturalization was illegally procured pursuant to 8 U.S.C. Sec. 1451(a). This case may be found at *United States v. Friedrich*, 305 F.Supp 2d 1101 (2004). The district court opinion was upheld in a decision reported as *United States v. Friedrich*, 402 F.3d 842 (8th Cir.), rehearing denied, 2005 U.S. App LEXIS 11106 (8th Cir. 2005). This is a petition for certiorari from the latter decision.

REASONS FOR GRANTING THE WRIT

Whether the decision of the court below violates the requirements of the Supreme Court decision in *Fedorenko* by failing to take into consideration surrounding circumstances in making a determination of what constitutes persecution.

The *Federenko v. United States*, 449 U.S. 490, 101 S. Ct. 737 (1981), decision has been relied upon not only in the context of whether one has "persecuted others" during the time of the Nazi regime of World War II, but also regarding whether or not one is disallowed political asylum or withholding of deportation due to actions taken in recent conflicts. The Court has not addressed the issue of

persecution of others since *Fedorenko*, and it should consider the various decisions relying on *Fedorenko* to clarify and elucidate the footnote which is often cited when a definition of persecution is called for. Granting the writ in this case would give the Court an opportunity to resolve the conflicts of the various Courts of Appeals in interpreting this important decision, as well as give the federal courts and agencies who are charged with interpreting the term guidance as to its meaning in the various contexts in which it occurs.

Fedorenko v. United States, 449 U.S. 490 (1981), is the sole decision of the Court which has addressed the meaning of persecution during the time of the Nazi persecutions of World War II. In footnote 34, the opinion by Justice Marshall states as follows:

The solution to the problem perceived by the District Court [in *Fedorenko*] lies not in "interpreting the [Displaced Persons] Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the persecutions of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave a concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case. . . .

Fedorenko v. United States, supra, at 513.

Rather than giving a definition of the term, this footnote states that determining persecution under the Displaced Persons Act is a line-drawing exercise. It has given courts latitude to find some individuals ineligible for benefits while finding others not to be disqualified in very similar circumstances. Seldom, however, have the courts or administrative agencies engaged in the type of exercise which ought to be carried out in a line-drawing situation. That is, they have not weighed the various nuances of the conduct of the individual against whom the disqualifying conduct is sought to be proved. The application of the *Fedorenko* footnote was at issue in the Eighth Circuit decision *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001), which implicated the activities of a Guatemalan asylum applicant who had been required against his will to participate in activities which certainly seems persecutory in nature, including engaging in a firing squad where he stated he tried to aim somewhat away from the person targeted. The BIA denied asylum on the basis of his having engaged in persecution but the Eighth Circuit reversed and remanded for further consideration in light of *Fedorenko*.

In *Hernandez*, the Petitioner argued that the legal standard applied by the Board to his case was inconsistent with *Fedorenko*. 258 F.3d at 211. He pointed out that the *Fedorenko* decision requires an individualized analysis of his conduct and that the Board had done no such analysis in coming to the conclusion under the law of asylum that he had assisted in persecution to the extent that he was no longer eligible for asylum. The same may be said for lack of analysis of the courts below in this case. For example, the Court of Appeals (App. B at 5a) quotes a portion of the paragraph from which footnote 34 is referenced:

"an individual's service as a concentration camp armed guard -whether voluntary or involuntary- made him ineligible for a visa." 449 U.S. at 512

However, neither the district court nor the Court of Appeals goes into detail to examine the qualification of this pronouncement obviously placed on it by footnote 34.

Contrast this minimal analysis with the detail which the Eighth Circuit went into to discuss the activities of Hernandez. 258 F.3d at 808-10, 814-15. Although Petitioner has not seen the opinion of the Board of Immigration Appeals in *Hernandez*, it is evident from the circuit court's opinion in that case that the Board's decision "did not reflect the type of analysis required [by *Fedorenko*.]" *Id.*, at 814. Mentioning one incident in which Hernandez had participated with his guerrilla associates in an execution-style shooting, the Board held that such participation was "'adequate to indicate'" that Hernandez had assisted in persecution. *Id.* The Court in *Hernandez* goes on to state as follows:

Without mentioning or analyzing other significant evidence that was relevant to Hernandez's culpability, [the Board] concluded that he had not met his burden of proving that he had not participated in persecution and that he was therefore ineligible for asylum and withholding of deportation.

As the Board noted, the burden of proof shifts to an asylum applicant once evidence is presented to show a mandatory ground for denial. This does not mean, however, that a petitioner will necessarily be held responsible for any involvement with a persecutory group. Unlike the case of an asylum applicant, the burden of proof does not shift to the Respondent in

immigration court to defend himself under the Holtzman Amendment, even though some evidence of assistance in persecution is presented. The government bears the burden to prove its case by clear, convincing and unequivocal evidence. [footnote by Petitioner] Rather a court must evaluate the entire record in order to determine whether the individual should be held personally culpable for his conduct for purposes of [the immigration law]. See *Fedorenko*, 449 U.S. at 512-13, n. 34.

This examination of the entire record is exactly what the District Court has not done in this matter. Accordingly, the Court should grant certiorari, set aside the decision of the district court, and then remand the case to allow it to fully and adequately determine the question of assistance in persecution pursuant to *Fedorenko*.

Just a few of the circumstances which the Board fails to discuss in its analysis are that (1) Petitioner never used his weapon to prevent an actual escape attempt (in fact, there was evidence that an escape occurred on his watch without his intervention), (2) the difficulty that Petitioner would have experienced had he attempted to leave once he was inducted (including the likelihood that he would have been apprehended and executed had he failed to report for duty), (3) the attempt of the Petitioner to first enlist in the German Army rather than the Waffen SS, but only to be turned away because he was not a German citizen, (4) the lack of sophistication and education of Petitioner, (5) the lack of knowledge on behalf of Petitioner when he was inducted that he would be serving at a concentration camp, (6) the systemization of the use of terror by the Nazis so that service as a guard at a concentration camp could appear to be a legitimate form of service to the German Reich, just as

important as service in the *Wehrmacht* or the fighting divisions of the *Waffen SS*, (7) Petitioner's low rank and lack of decisionmaking authority.

A number of circuit court decisions involving the issue of persecution in the context of service as a concentration camp guard, as here, have concluded with little discussion, that the service involved persecution. See, for example, *Shellong v. INS*, 805 F.2d 512 (7th Cir. 1986). On the other hand, other courts have not been so charitable to the government and have found the term ambiguous such that it was necessary to refer to the legislative history to determine the intent of Congress. *Petkiewytshch v. INS*, 750 F.2d 871, 879-80 (6th Cir. 1991). See also *Lapenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985). When these latter cases are considered, one wonders how their results can be squared with the results of the Seventh Circuit and others which have given short shrift to any discussion if the meaning of the term persecution in cases involving Nazi concentration camp guards.

Eventually the meaning of the word "persecution" in Nazi concentration camp cases will no longer be relevant due to the deaths of those who might have been implicated in the activities of the Nazi regime of World War II. Due to lapse of time, the ones who are targeted for denaturalization under *Fedorenko* at the present time were the youngest recruits possible at the time of the war. Their youth at the time of their induction into the service of the Nazi regime ought to be a mitigating factor in their favor. They were not long-time Nazis, but more important, due to their advanced age and in many cases, ill health, the Court's action to consider this issue now is the last chance that there can be a review of the meaning of the term "persecution" in the context of these cases such as to be meaningful to persons such as Petitioner, who along with almost all of the others targeted have led